94 S. E. 968, shows this doubt which prevails in some courts' minds. The plaintiff, who had entered the defendant's store with several companions, on hearing a disturbance in the opposite side of the room, went across the room to investigate. The defendant owner was in the act of commanding his companions to leave and before the plaintiff could get out the defendant struck him repeatedly with a cleaver and the defendant's clerk stabbed him in the back. In an action for assault and battery in which the plaintiff attempted to recover punitive damages, it was held that the plaintiff could not recover. In this case it was said that punitive damages should not be awarded in any case where the amount of compensatory damages is adequate to punish the defendant; and in a case where such compensatory damages are not adequate for the purpose of punishment, only such additional amount should be awarded, as taken together with the compensatory damages will sufficiently punish the defendant. Such a holding makes a change in the generally accepted doctrine of punitive damages. It is apparent that confusion still exists as to this anomalous doctrine. The truth of the words of Judge Foster in *Fay* v. *Parker* is evident: "We have conducted ourselves improperly for so long a time and we have acted improperly because, for a long time we misunderstood what we now understand, namely that we were in error, that on the whole, we prefer to trample under foot the sacredest maxims of the common law rather than sacrifice the pride we feel in our stubborn inconsistency." But instead of adhering to this inconvenient and authoritative rule, there is yet time to break away from it and some courts have done so.[26]

USER BY THE GENERAL PUBLIC AS CONSTITUTING ACCEPTANCE OF AN OFFER TO DEDICATE A HIGHWAY.—There are two kinds of dedication of highways to the public, common law and statutory. The common law dedication merely gives the public the right to pass over the land, while the fee remains in the owner.[1] The fee is often vested in the city in the case of statutory dedication.[2] On questions of statutory dedication the particular statute must be referred to in each instance; and substantial compliance with the terms of the statute is necessary to effect such dedication. But where the dedication fails as a statutory dedication, because of the omission of some formality, it may take effect as a common law dedication.[3]

In order to effect a common law dedication, there must be clear and convincing evidence of an intent to dedicate on the part of

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[26] Exemplary damages are not awarded in Massachusetts, Colorado, Nebraska, Washington and New Hampshire.

[1] Attorney-General *v.* Abbott, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251. See LILE, NOTES ON MUN. CORP., 3 ed., p. 15.

[2] Downend *v.* Kansas City, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170.

[3] City of Caruthersville *v.* Huffman, 262 Mo. 367, 171 S. W. 323. See LILE, NOTES ON MUN. CORP., 3 ed., p. 14.

the owner;[4] but this intention need not be express, but may be implied from acts of the owner. Probably the most common mode of dedication is by the owner's making of plats or maps showing streets or highways; but this is by no means necessary.[5] It has been held that an intent to dedicate will be implied where the owner has permitted the use of the land as a highway for a long time.[6] No particular length of time is necessary, though the use must have been for so long a time that the public convenience would be interfered with by its interruption.[7]

Not only must there be an offer to dedicate by the owner, but there must be an acceptance of the highway, for no one can make a public way out of his private property by an offer alone.[8] As to what constitutes acceptance, the authorities are in direct conflict. One line of cases holds the view that user by the general public alone is sufficient acceptance; the other view is that user by the general public is not enough to constitute an acceptance of the offer to dedicate, but that it is essential that the highway be accepted by the municipal or county authorities. It is usually stated that the former is the great weight of authority, but an analysis of these cases shows that a distinction should be drawn here—which a great number of the cases cited as sustaining the majority view fail to draw—between acceptance so as to estop the owner to withdraw his offer and acceptance so as to charge the municipality or county with the burden of repairing the highway. All the cases hold that public user for a long period without acceptance by the authorities will estop the owner from denying that the road is public.[9] This is based on principles of *estoppel in pais*—

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[4] Lee *v.* Lake, 14 Mich. 12, 90 Am. Dec. 220; Niles *v.* City of Los Angeles, 125 Cal. 572, 58 Pac. 190; Rose *v.* Village of Elizabethtown (Ill.), 114 N. E. 14. In Stacy *v.* Glen Ellyn Hotel, etc., Co., 223 Ill. 546, 79 N. E. 133, 8 L. R. A. (N. S.) 966, it was said: "A dedication is not an act of omission to assert a right, but is the affirmative act of the donor resulting from an active, and not a passive, condition of the owner's mind on the subject. A mere nonassertion of right does not establish a dedication unless the circumstances establish a purpose or intention to donate the use to the public."

[5] Att'y Gen. *v.* Onset Bay Grove Ass'n, 221 Mass. 342, 109 N. E. 165; City of Cincinatti *v.* White, 6 Pet. 431; Doyle *v.* City of Chattanooga, 128 Tenn. 433, 161 S. W. 997.

[6] Sarpy *v.* Municipality No. 2, 9 La. Ann. 597, 61 Am. Dec. 221. But if the public is claiming the road to be a highway under an adverse claim of right against the owner, then the use by the public must have continued for the statutory period, and the highway then exists by adverse possession, and not by dedication. Whitesides *v.* Green, 13 Utah 341, 57 Am. St. Rep. 740, and note; Hast *v.* Piedmont & C. R. Co., 52 W. Va. 396, 44 S. E. 155.

[7] Riley *v.* Buchanan, 116 Ky. 625, 76 S. W. 527, 63 L. R. A. 642, 3 Ann. Cas. 788; Manderschid *v.* City of Dubuque, 29 Iowa 73, 4 Am. Rep. 196; Marion *v.* Skillman, 127 Ind. 130, 26 N. E. 676, 11 L. R. A. 55.

[8] Lee *v.* Lake, *supra;* City of Cincinnatti *v.* White, *supra.*

[9] Downend *v.* Kansas City, *supra;* United New Jersey, etc., Co. *v.* Crucible Steel Co. (N. J.), 95 Atl. 243; Riley *v.* Buchanan, *supra;* Sarpy *v.* Municipality No. 2, *supra;* Hoboken Land, etc., Co. *v.* Hoboken, 36 N. J. L. 540.

that one, who has allowed the public to act on reliance of his holding out so that private rights or public accommodation would be affected by his change of position, is not permitted to conduct himself so as to injure those who have acted upon his holding out. Thus equity will enjoin the obstruction of a street, although it has not been accepted by the city, where lots were bought in reliance upon the plat that such was a public street.[10] Each case should go to the jury on its own facts, and no particular length of time during which the public use has continued is essential.

However, only a few of the cases cited for the majority view go so far as to hold that acceptance by the general public puts upon the city or county the burden of repairing the highway, rendering it liable to persons injured because of defects therein caused by nonrepair.[11] The sound view is that the city or county is not liable for injuries caused by defects in the highway unless the proper authorities have accepted the offer of the owner to dedicate.[12] The right of the public to demand of the owner that he keep the street open does not give the public the right to demand the city to maintain and repair the street. The view that the duty of maintenance and repair of streets can be forced upon a city by the acts of the unorganized public is inconsistent with the principles of efficiency and economy. As was said in the case of *State* v. *Kent County Commissioners*:[13]

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[10] United New Jersey, etc., Co. *v.* Crucible Steel Co., *supra.*

[11] Manderschid *v.* City of Dubuque, *supra;* Riley *v.* Buchanan, *supra;* City of Hammond *v.* Maher, 30 Ind. App. 286, 65 N. E. 1055; Doyle *v.* City of Chattanooga, *supra;* Benton *v.* City of St. Louis, 217 Mo. 687, 118 S. W. 418, 129 Am. St. Rep. 561. Mr. Elliott puts forth the following argument for the doctrine that public use alone constitutes acceptance: The officers of the municipal corporation are the mere agents of the people, who are the principals; therefore if the principals themselves accept the street as public, what difference does it make that the agents have not acted? ELLIOTT, ROADS AND STREETS, 2 ed., § 154. See also Doyle *v.* City of Chattanooga, *supra,* and Benton *v.* City of St. Louis, *supra.* But this argument entirely overlooks the fact that the sole control of the streets is vested in the municipal corporation by its charter and that the municipality can act only through its proper officers. Cincinnatti & M. V. R. Co. *v.* Village of Roseville, 76 Ohio St. 108, 81 N. E. 178.

[12] Downend *v.* Kansas City, *supra;* Hoboken Land, etc., Co. *v.* Hoboken, *supra;* H. A. Hillmer & Co. *v.* Behr, 264 Ill. 568, 106 N. E. 481; State *v.* Kent County Commissioners, 83 Md. 377, 33 L. R. A. 291; Gedge *v.* Commonwealth, 9 Bush (Ky.) 61; Smith *v.* Smythe, 197 N. Y. 457, 90 N. E. 1121, 35 L. R. A. (N. S.) 524; and see Hast *v.* Piedmont & C. R. Co., *supra.* Acceptance by the municipal authorities was held necessary in the case of statutory dedication in Ramstad *v.* Carr, 31 N. D. 504, 154 N. W. 195, L. R. A. 1916B, 1160. And in Koloen *v.* Pilot Mound Township (N. D.), 157 N. W. 672, L. R. A. 1917A, 350, it was held that the municipal authorities must accept a Congressional dedication. The Virginia Courts draw a distinction between the acceptance of streets and roads, holding that streets must be accepted by the municipal officers and that roads must be accepted by the county courts. Lynchburg Traction Co. *v.* Guill, 107 Va. 86, 57 S. E. 644; Commonwealth *v.* Kelly, 8 Gratt. 632.

[13] *Supra.*

> "If this were not so, and if the naked circumstance that a designated way had been immemorially used as a footway were sufficient of itself to found a presumption of acceptance on, there would be hundreds of by-paths in every county, * * * that would require the supervision of the county authorities, and that might, if permitted to become dangerous, subject the county to pecuniary liability for injuries occurring on them."

Furthermore, it would be difficult for the authorities to determine which roads are sufficiently used by the public generally to make them public highways, if public user alone were sufficient. For a road may be used very often by a few people or very seldom by a large number of people. It would be necessary for the authorities to institute a suit concerning each road and introduce evidence so that the matter might be settled judicially. Even this is not feasible; for a way that is but little used at one time may become much frequented as business shifts from one district to another. Judge Dillon in his great work on municipal corporations says that acceptance by the municipal authorities is necessary:[14]

> "For some purposes, acceptance by the municipal authorities is essential, and acceptance by mere public user is not sufficient. Thus, in order to charge the municipality or local district with the duty of repair, or to make it liable for injuries for suffering the street or highway to be or remain defective, there must be more than an acceptance of the dedication by general public user. There must be an acceptance by the municipality or by the proper or authorized local public authorities."

Under this view a rather unique situation is presented where the owner is estopped to revoke his dedication, but where the authorities have not yet accepted the highway. The original owner cannot prevent the public from using the road, but he is certainly under no duty to maintain or repair it. Nor is the municipality or county under any duty of repairing the road. The result is that there exists a highway open for the use of the public, but there is no one owing the duty to keep it in repair and no one liable for injuries arising out of a failure to do so. The remedy for such a situation is to mandamus the authorities to accept the road and if the court finds that the public convenience demands that the road be repaired, it will force the city to do so.

However, it is not necessary that the acceptance of the authorities should be expressed or that it should take the form of an ordinance passed by the city council, but the acceptance of the road may be implied from the acts of the municipal officers. Any acts which show that the way is regarded by the city authorities as a street which they control and for the repair and maintenance of which they are responsible will make the highway a public one. But the courts differ as to what acts on the part of the authorities

[14] 3 DILLON, MUN. CORP., 5 ed., § 1087.

are sufficient evidence to prove that the authorities have accepted the road, and the question will be usually left to the jury. The most general way of showing implied acceptance is by proof that the city has graded, paved or repaired the street.[15] And if the city places fire plugs and lights on the street this is evidence of acceptance.[16] So from the policing of the street an acceptance by the authorities may be implied.[17] And the passage of an ordinance affecting the street is strong evidence of acceptance.[18] It has been held that the express acceptance by the authorities of the streets shown in a plat constitutes an acceptance of the inclosed alleys.[19]

On the other hand, it has been held that the acceptance by the common council of a plat is not an acceptance of the offer to dedicate the streets therein shown.[20] And the naming of a street is not sufficient to show acceptance.[21] Nor is the mere fact that the tax assessors have exempted from taxation the land which is offered as a street sufficient to show acceptance on the part of the municipal authorities; for the tax assessor is not the proper officer to accept the streets, and it is essential that the acceptance be by the proper authorities.[22] Of course, these questions do not arise where the street has been expressly accepted by an ordinance passed by the municipal council.

It is true that in deciding the question of acceptance public user may be entitled to some weight, for it is presumed that one will accept that which is beneficial to him. Therefore, public user may be introduced to show that the way is necessary and convenient and will be a benefit to the public.[23] Where the way is clearly beneficial and necessary, slight acts of the authorities are taken to show acceptance,[24] but where the benefit is more doubtful or where the way will be a burden to the city or county, much stronger evidence of acceptance by the city or county authorities must be shown.[25]

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[15] Mulligan *v.* McGregor, 165 Ky. 222, 176 S. W. 1129; Woodburn *v.* Town of Sterling, 184 Ill. 208, 56 N. E. 378.

[16] Doyle *v.* City of Chattanooga, *supra;* Benton *v.* City of St. Louis, *supra.*

[17] Southern R. Co. *v.* Caplinger, 151 Ky. 749, 152 S. W. 947, 49 L. R. A. (N. S.) 660.

[18] Southern R. Co. *v.* Caplinger, *supra.*

[19] City of Caruthersville *v.* Huffman, *supra.*

[20] Downend *v.* Kansas City, *supra.*

[21] Rose *v.* Village of Elizabethtown, *supra.*

[22] H. A. Hillman & Co. *v.* Behr, *supra;* Ramstad *v.* Carr, *supra* (extensive note).

[23] Penick *v.* Morgan County, 131 Ga. 385, 62 S. E. 300; Woodburn *v.* Town of Sterling, *supra.*

[24] Riley *v.* Buchanan, *supra;* Campbell *v.* Elkins, 58 W. Va. 308, 52 S. E. 220, 2 L. R. A. (N. S.) 159. It has been held that acceptance by the authorities is unnecessary in the case of an offer to dedicate a public park, since no burden is put upon the city, as in the case of streets. Abbott *v.* Inhabitants of Cottage City, 143 Mass. 521, 58 Am. Rep. 143; Attorney-General *v.* Abbott, *supra.*

[25] Irving *v.* Ford, 65 Mich. 241, 32 N. W. 601; A. H. Hillmer & Co. *v.* Behr, *supra.*

After acceptance, the offer to dedicate becomes irrevocable; but it may be revoked at any time before acceptance.[26] Moreover, such acceptance must come within a reasonable time after the offer to dedicate, but the reasonableness of the time is determined solely by the convenience of the city.[27] The revocation of the offer may be implied from conduct as well as when it is expressed, and any acts which are inconsistent with the continuance of the offer may be deemed a revocation.[28]

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[26] Rose *v.* Village of Elizabethtown, *supra;* Woodburn *v.* Town of Sterling, *supra.*

[27] People *v.* Reed, 81 Cal. 70; Ramstad *v.* Carr, *supra.*

[28] Rose *v.* Village of Elizabethtown, *supra.*